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No. 08-439

In The

Supreme Court Of The United States

MARCEL WINDT; E.T. MEIJER, IN THEIR CAPACITY AS TRUSTEES IN BANKRUPTCY FOR KPNQWEST, N.V.,
Petitioners,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC., JOHN A. MCMASTER; JOSEPH P. NACCHIO; ROBERT S. WOODRUFF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

As demonstrated below, Respondents' effort to portray the *forum non conveniens* doctrine as sufficiently *ad hoc*, flexible, and discretionary to avoid the need even to understand the domestic forum that is to be compared to the foreign forum fails both practically and logically and does not mute the conflict between the circuits on how the domestic forum should be defined. This Court should resolve the conflict and correct the Third Circuit's error of treating the absence of local contacts as decisive on the forum question.

I. THE "FLEXIBILITY" OF THE *FORUM NON CONVENIENS* DOCTRINE DOES NOT ELIMINATE THE NEED TO SPECIFY THE RELEVANT DOMESTIC FORUM.

The question presented by the Petition is whether, in addressing *forum non conveniens*, the relevant domestic forum – to be compared with the foreign forum – is the United States as a whole, or merely the judicial district in which the district court sits. The answer, as demonstrated in the Petition, is that the relevant domestic forum is, as a matter of principle, necessarily the United States as a whole. Focusing instead on the particular district where the court sits fundamentally changes the frame of reference and the result, as demonstrated by the decision below. The Third Circuit's decision to do so – and its suggestion that it was deciding only whether the case was convenient in New Jersey, implying that the Trustees were free to try their luck in another district – puts it in conflict with at least

three other circuits. Furthermore, the apparent confusion surrounding this issue (reflected in Respondents' arguments) and its importance (as reflected by the amicus filings) highlight why this is an issue that this Court should address.

A. The Forum Frame Of Reference Is Central To Both Steps Of The *Forum Non Conveniens* Inquiry, And Not Negated By The Need For Flexibility.

Respondents suggest that the split in the circuits on the question presented by the Petition is not as sharp as the Trustees have presented it. Respondents do not directly dispute that the Third Circuit adopted Respondents' argument that "the proper analysis focuses on ties to the forum district," not the nation. Respondents also offer no logical defense of why federal courts judging *forum non conveniens* should decide anything other than whether the entire United States presents a convenient forum.

Instead, Respondents assert that there is uniformity in the circuits because all courts acknowledge "flexibility" in the *forum non conveniens* balancing test that encompasses consideration of both national *and local* "factors," Br. in Op. at 6, "connections," *id.* at 8, or "interests," *id.* at 9. But the flexibility to consider "local interests" in the balance does not negate the need of the court to frame the convenience analysis with regard to the United States as a whole.

Respondents' mistake in invoking "flexibility" as a way of avoiding the need to specify the domestic forum is easily illustrated. The mistake is evident in each of the two steps of the established *forum non conveniens* analysis.

1. The Third Circuit Showed No "Flexibility" To Consider National Contacts In Refusing To Grant Deference To The Trustees' Choice Of Forum.

As this Court suggested in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981), the first step of the *forum non conveniens* analysis is to determine how much deference to accord the plaintiff's choice of forum. With the degree of deference then determined, the court, at a second step, weighs the conveniences of the plaintiff's chosen forum against conveniences of the defendant's proposed forum.[1] Success at the second step often turns on whether deference is given to the plaintiff's choice of forum at the first step.

For plaintiffs who are U.S. citizens, courts readily defer to the choice of forum; the plaintiff has a presumed right to choose the forum. At this first step of the *forum non conveniens* analysis, however, *foreign* plaintiffs must, in effect, earn the court's

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[1] *See, e.g., Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 45-46 (3d Cir. 1989) (first addressing deference to plaintiff's forum choice, then weighing private and public interest factors).

deference.[2] To obtain deference, the foreign plaintiff must make a *prima facie* showing of convenience for proceeding in the chosen forum. *See, e.g., Lony v. E.I. du Pont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir. 1989).

It is easily seen how the Third Circuit went astray at the first step by establishing a purely local frame of reference for its deference analysis. In denying deference to the Trustees' choice of forum based on the Trustees' ostensible failure to make a prima facie showing of convenience with respect to *New Jersey*, the Third Circuit did not give any serious consideration to the many conveniences raised by the Trustees for proceeding in the United States generally. *See* App. 12a-17a. The "flexibility" that Respondents tout was surely not demonstrated, and the court's focus on New Jersey in its forum frame of reference was thus decisive because the Trustees had otherwise made a prima facie showing of why *the United States* was a convenient forum for their lawsuit. The Third Circuit's focus on New Jersey left the Trustees with minimal deference to their forum choice.

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[2] Petitioners agree with *amicus curiae* INSOL Europe (at 10-13) that the statement in *Piper* that foreign plaintiffs are to be given "less deference" to begin than domestic plaintiffs (454 U.S. at 256) rests on antiquated factual foundations and should be reconsidered.

2. Examining Local Interests As Part Of The Balance Does Not Change The Forum Frame Of Reference.

Respondents' (and the Third Circuit's) error is easily seen at step two, also. "Flexibility" to consider both national *and local* "factors," Br. in Op. at 6, or "connections," *id.* at 8, or "interests," *id.* at 9, is traditionally cited as part of this second step, which balances conveniences between the plaintiff's chosen forum and the defendant's proposed foreign forum. But even at this second step, the "flexibility" associated with the application of the doctrine does not change the court's need to comprehend whether it should compare the foreign forum in relation to the entire United States or only the local district. As demonstrated in the Petition, courts should balance the conveniences of the *entire* United States against the foreign nation.

So what then of the frequently recited rule that the balance is sufficiently flexible that local interests can be considered as part of the balance? Simply put, consideration of local interest should not, in any way, change the forum frame of reference. Courts can surely consider whether affirmative local ties, along with affirmative national ties, weigh in favor of keeping the case in the United States. Thus, the *presence* of local ties is relevant. But a court cannot use the *absence* of local ties as a ground for moving the case from the United States. That approach inappropriately subordinates the interests of the United States to those of a particular locale.

That is precisely what the Third Circuit did, however. The Court of Appeals held, both in denying deference (step one) and in the balance (step two), that *the absence* of ties to New Jersey warranted dismissal. The court cited no rationale for that decision (and neither do Respondents). While local ties might support suit in the United States, the *absence* of local ties could be decisive only if the local district provided the proper frame of reference for comparison, which it does not, even at the second step of the *forum non conveniens* analysis.

In sum, Respondents' effort to reformulate the question presented to focus on the "flexibility" of the *forum non conveniens* doctrine to accommodate local considerations, Br. in Opp. at i, simply distorts the issue presented by the Petition and the Third Circuit's decision. The extent of the doctrine's "flexibility" is only relevant after the forum frame of reference is understood.

B. The Third Circuit Gave No Consideration To The Conveniences Of Proceeding In The United States.

In denying deference to the Trustees' choice of forum, the Third Circuit ignored the Trustees' showing of why they filed suit in the United States. As noted in the Petition (at 20-21), there were numerous and obvious reasons of convenience for filing here. Given its narrow focus on New Jersey, however, the Third Circuit found the fact that two defendants were New Jersey residents was insufficient to carry the day.

Respondents imply by their brief that the "flexible" analysis is so *ad hoc* that the court need not even determine whether it is analyzing the forum question in relation to the United States as a whole or the local district. Respondents fail, however, to identify any principled basis for *why*, in international litigation, the comparison should ever be between the local domestic forum and the national foreign forum. A federal court should, at least, be able to resolve the basic question of whether a case belongs in the United States, not merely in the district where the court sits.

Respondents also assert that the Third Circuit actually considered all relevant "factors," local and national, as part of the *second* step of its flexible analysis. Br. in Opp. at 8-9, 18-19. But even if one were to accept the proposition that an *ad hoc*, mixed-forum analysis is proper (which it is not), Respondents expressly argued to the Third Circuit that the *forum non conveniens* analysis never focuses on the United States as a whole but, rather, "focuses on ties to the forum district." This was precisely the logic embraced by the Third Circuit, which did not so much as pay lip service at step one of its analysis to the factors cited by Petitioners demonstrating national convenience. *See* App. 12a-17a.

Indeed, it is difficult to portray the Third Circuit's decision as even a partial comparison between the United States as a whole and the Dutch forum. The Third Circuit emphasized that "*New Jersey*" is not the home of the corporate defendant, that it did not believe evidence was "concentrated in

New Jersey," and that it did not believe the conduct giving rise to the lawsuit "occurred in *New Jersey*." *Id.* 15a (emphasis added). In a rare instance in which it expressly acknowledged any aspect of the Trustees' demonstration of convenience, *i.e.*, the presence of many witnesses in the United States (considered at step two), the court was utterly dismissive, stating that "almost all of the witnesses reside outside of *New Jersey*." *Id.* 23a (emphasis added). The court thus focused squarely on the local forum, exactly as Respondents urged. It stated that local inconvenience could dwarf national convenience, *see id.* 16a, and, without any explanation, concluded that this was such a case.

That the Third Circuit's analysis revolved around a comparison of *New Jersey* to the Dutch forum is demonstrated further by the court's express "caveat" that its ruling was not to be construed as reflecting its opinion of the convenience of the United States as a whole. *See id.* 16a. The court stated that its decision was "based on local considerations," and it left open the possibility that the Trustees could re-file their lawsuit "in another, *convenient* district." *Id.* (emphasis added).

Respondents argue that the Third Circuit was saying only that the preclusive effect of its decision was not being decided. *See* Br. in Opp. at 9 n.5. But the Third Circuit was not mincing words. As a corollary to its focus on New Jersey, it was acknowledging that it was only deciding the *forum non conveniens* question as it related to the *New Jersey* forum.

II. THE CIRCUITS ARE SPLIT ON WHAT CONSTITUTES THE RELEVANT FORUM IN FEDERAL LITIGATION.

The First, Eighth, and Eleventh Circuits all hold that the relevant American forum is the United States. Respondents' attempt to explain away the cases from these three circuits – all of which are good law and in direct conflict with the decision of the Third Circuit – falls far short.

The Eleventh Circuit held squarely in *Esfeld v. Costa Crociere, S.P.A.* that "federal courts, in the *forum non conveniens* context, do not focus on the connection between the case and a particular state, but rather on the connection of the case to the United States as a whole." 289 F.3d 1300, 1303 (11th Cir. 2002). It does not matter that the case was decided in a diversity context. The impetus for the court's statement was a need to explain why the rule was different in federal court than it would be in state court. Indeed, it explained at length that in federal court, considerations of convenience to the locality are addressed under 28 U.S.C. § 1404(a). *See id.* at 1313.

The same rule was applied by the Eighth Circuit in *Reid-Walen v. Hansen*, which Respondents try to distinguish by pointing out that the plaintiff was a U.S. citizen suing out of her home federal district. But Respondents' point is a classic distinction without a difference: If the relevant forum in federal litigation is, as the Eighth Circuit plainly held, "any federal district in the United States, not the particular district where the plaintiff

lives," 933 F.2d 1390, 1394 (8th Cir. 1991), that is true regardless of the plaintiff's residence or citizenship.

As observed in the Petition, the First Circuit – emphasizing that "the choice ... was between two *countries*," and thus "local to the United States" – faulted the district court for limiting its perspective on forum "convenience" to the district in which the plaintiff had filed its suit. *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 429-30 (1st Cir. 1991) (emphasis in original). There is nothing "inexplicable" about why Petitioners did not cite the later opinion in *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345 (1st Cir. 1992). The second *Mercier* opinion simply recognized that it is possible that the local connection to the lawsuit "*may*," as a "*subsidiary consideration*," factor into the balancing of interests between the domestic and foreign forums. *Id.* at 1355 (emphasis added). Even then it affirmed that the "transnational comparison" is "dominant." *Id.*

To the extent there is inconsistency and confusion in the lower courts on how local considerations come into play (as is suggested in the way that Respondents portray the *flexibility* of the doctrine), that is all the more reason for this Court to grant certiorari.

III. THE QUESTION RAISED BY THE PETITION IS WELL SUITED FOR REVIEW.

Respondents weakly suggest infirmities in the way this case developed in the district court that

might affect the disposition of the Petition. Respondents are wrong. The question presented by the Petition is one of law and arises directly from the decision of the Third Circuit as written. Nonetheless, for the sake of clarity, we address Respondents' suggestions briefly.

First, Respondents oddly and wrongly assert that the Trustees never argued that the United States was convenient. *See* Br. in Opp. at 17 n.8. As described in the Petition (at 20-21), the Trustees pointed out a range of convenience factors to the district court (and the Court of Appeals) demonstrating that the United States is a convenient, indeed logical, forum. Although wrong in its analysis, the Third Circuit (and the district court) never suggested that the Trustees failed to argue convenience, and the issue is fit for further review. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (review is proper if an issue has been passed upon).

Second, regarding the "related Dutch proceedings" considered in the balance of interests, Br. in Opp. at 4, none of those matters was pending when this case was filed, one is simply an attempt by the same defendants to collect under a director and officers insurance policy for the defense of this and other related litigation, the second is a nominal investigatory proceeding by complaining shareholders, and the last is a suit by a bank stemming from a single loan made to KPNQwest. On the other hand, there were also several cases pending against the same defendants in the United

States, including cases involving conduct at KPNQwest, but the lower courts gave them no weight. *See* App. 31a.

Third, the district court's finding, with which the Third Circuit agreed, that the balance "tipped decidedly" in favor of trying this lawsuit in the Netherlands, *see* Br. in Opp. at 20-22, is no obstacle to review of the legal issue presented inasmuch as that finding itself was skewed by the lower courts' unusual focus on New Jersey, instead of the United States, as the relevant forum. Reliance on the district court's approach is particularly misplaced because the district court based its entire analysis on an explicit presumption of hostility toward foreign plaintiffs, *see* App. 50a & n.10, and the fact that the Trustees – appointees of a Dutch bankruptcy court – lacked connection to New Jersey in their personal capacity. *See id.* 57a. Although it was perhaps not as overtly suspicious of foreign plaintiffs as was the district court, the Third Circuit's focus on New Jersey reflected an equally improper and provincial approach to *forum non conveniens*.

Fourth, Chapter 15 of the Bankruptcy Code and the Treaty of Friendship both show that a foreign plaintiff's access to federal courts presents a national, not local, question. The Trustees did not invoke the treaty in their district court briefing but the district court *sua sponte* raised the supposed *absence* of such a treaty (which had already been presented to the district court) to justify denying deference to the Trustees. *See* App. 54a n.13; *id.* 57a n.14. The district court itself thus put the treaty of

friendship into issue, *see United States v. Williams*, *supra*, and the Trustees raised it again on appeal as a clear public interest factor and as supporting their claim that they were entitled to be treated on a par with U.S. citizens. The Third Circuit was wrong to ignore it.[3]

CONCLUSION

The petition should be granted.

Respectfully submitted,

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[3] Finally, the merits of the underlying RICO claim were not addressed below and are not at issue in this Court. *See id.* at 18 n.9.